UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 28

In the Matter of: MGM GRAND HOTEL, LLC d/b/a MGM GRAND HOTEL & CASINO and CYNTHIA THOMAS, An Individual.	Case No. 28-CA-186022

MGM GRAND HOTEL, LLC d/b/a MGM GRAND HOTEL & CASINO'S POST-HEARING BRIEF

Before John T. Giannopoulos, Administrative Law Judge

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MGM GRAND HOTEL & CASINO'S POST HEARING BRIEF

Administrative Law Judge John T. Giannopoulos conducted a hearing regarding Cynthia Thomas' unfair labor practice charge and the General Counsel's Amended Complaint in February 2019. As set forth in more detail below, the General Counsel failed to establish any of the unfair labor practices alleged. The Amended Complaint should be dismissed in its entirety.

I. SUMMARY OF ARGUMENT

As amended, the Complaint contains a single allegation: that MGM Grand violated the Act when it terminated Cynthia Thomas for instructing her coworker Lee Crain to lie during an investigation. The General Counsel advanced three theories in support of this allegation.

First, it contended that Thomas sent her text message in her capacity as a shop steward, and as such, it must be deemed protected, and her discharge deemed unlawful, unless the Company can show that the text was so opprobrious that it lost the protection of the Act. In other words, that Thomas' conduct should be analyzed under the tests set forth in the Board's res gestae cases such as *Desert Cab*, 367 NLRB No. 87 at slip op. 13 (Feb. 8, 2019).

The General Counsel's second, and related theory, was that Thomas' text message to Crain was protected and that the discharge should be deemed unlawful unless MGM Grand can establish that the communication constituted misconduct under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964).

The General Counsel's third and final theory is motive based. It contended that the Company's conclusion that Thomas had instructed Crain to lie was mere pretext, and that she had in fact been terminated in retaliation for prior concerted and protected activities, including her work as a shop steward and her communication with Steve Ford regarding the opening of Loser's Lounge.

None of these theories has merit. The first two are essentially the same – res gestae and *Burnup & Sims* – and both require that the General Counsel prove that MGM Grand *knew* that Thomas was acting in her capacity as a shop steward when she sent the text message to Crain; it is an *explicit* part of the Supreme Court's four factor test. The General Counsel, however, did not prove that.

The General Counsel did not prove that Thomas was acting as a steward.

- There is no dispute that neither Crain nor Jones nor anyone else asked Thomas to render services as a steward.

- The fact that Nathan Brown had spoken to her about the incident because he wanted to know more about the shop steward's role when an employee is placed on suspension pending investigation ("SPI") does not establish that Thomas' subsequent actions are protected.

- If Thomas was in fact acting as a steward she would have told the Company that. Yet the *only* witness who suggested Thomas was acting in her capacity as a steward was Thomas herself, and even she refused to testify that she had told MGM Grand that she had sent the text message to Crain in a representative capacity; after initially conceding that she had not done so, she settled on a claim that she could not remember doing so.[1] Tr. 636.

- As a steward, Thomas would have represented the employee, Jones, in her own union, but she did not do so.

- As a steward, Thomas would have memorialized her efforts to contact Crain just as she memorialized her meetings with Monica Dorsey and others. She would have kept her the text messages, just as she kept those messages regarding Steve Ford. GCX 16, Tr. 628-30. But she did not do those things either. She deleted her text messages to Crain, claiming that they were unimportant. Tr. 628-30.

- **Indeed, despite testifying several times that she was acting as a steward, when cross-examined Thomas evasively claimed she could not remember sending the text, Tr. 636, and when asked about the text's meaning, she disingenuously said "if that's what the text says." Tr. 631-32.[2]**

[1] Thomas is not a credible witness. Her credibility is discussed below.

[2] It is worth noting that during the grievance arbitration, Thomas claimed that her recollection of the time period surrounding the text message to Crain was unreliable and incomplete because she was taking a variety of medications. *See* JX 2 at 382-383. Indeed, that was the gravamen of her

- Thomas made no effort to follow up with Crain about the outcome of the due process meeting.
- Thomas did not provide a statement – a glaring omission if she was acting in a representative capacity.

- Her testimony was contradicted by Maureen Keefe-Wiseman, Tr. 671-674, and Michelle Zornes, Tr. 670, both of whom stated that Thomas did not claim she was acting as a steward.

- The General Counsel made no effort to corroborate Thomas' testimony. She conspicuously avoided asking Thomas' fellow steward Tanara Pastore to corroborate her coworker's claim that she had informed the Company that she was acting as a steward. Tr. 38-102. And, Pastore's notes from the due process meeting contain no reference to a claim by Thomas that she was acting as a steward. RX 12.

The General Counsel has the burden of proof as to all of the allegations necessary to establish a violation of the Act. Given the foregoing facts, the ALJ cannot reasonably conclude that the General Counsel met her burden here. The only "evidence" in the record are Thomas' repeated statements regarding her private intent. Thomas' unannounced intentions simply cannot be sufficient to establish that she was acting as a steward. Finding that an unannounced private intention is enough would excuse the General Counsel from meeting her burden of proof. It would also put employers in an untenable position. An employee would be able to cloak his or her actions with the protection of the fact simply by claiming after the fact, as Thomas has done here, that the employee was acting as a steward or engaging in some other unspecified union activity.

These issues to the side, the foregoing tests also require the General Counsel to establish that Thomas' underlying message to Crain was protected and concerted under the Act. It failed in that regard as well. The Board recently clarified the meaning of "concerted activity" in *Alstate*

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defense during the arbitration. The fact that she made no such claim here – presumably because the Arbitrator rejected the defense and found that it was consistent with guilt – is further evidence that she is an untrustworthy witness who lacks candor. How can a witness go from claiming that she could not remember anything from the relevant time period to testifying repeatedly and with specificity that she was acting as a steward?

Maintenance, 367 NLRB No. 68 (January 11, 2019). It confirmed that activity is concerted only when it is "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* (citing *Meyers I*, 268 NLRB 493, 496 (1984)). Thomas' text messages to Crain clearly were not "with or on the authority of other employees." *Id.* Neither Crain nor anyone else ever requested her services. She never claimed to the Company at any time that she was acting as a steward. Indeed, the Shop Steward training documents introduced by the General Counsel, GCX 2, establish that Thomas did not do any of the things she had been trained to do. She did not investigate. She did seek to caucus with Crain or Jones to learn the facts. She did not counsel Crain to "tell the truth." Thomas instructed Crain to tell a story without regard to its truth or falsity. She was acting on her own accord, unsolicited.

For similar reasons, even if one assumed that Thomas' actions were concerted, under *Alstate Maintenance*, they were not for "purpose of mutual aid and protection." Again, whatever Thomas' motivations may have been, they were her own. Thomas' advice to Crain recklessly disregarded the truth. Crain did not ask her to participate. She did not perform a good faith investigation.

Finally, even if your honor concluded that the General Counsel met her burden of showing that MGM Grand knew that Thomas was acting as a steward, and also that the underlying text message to Crain was protected and concerted, the Complaint must still be dismissed. Thomas instructed Crain to lie. She told him to "claim" that he saw Fontay Jones attempt to ring a beer into the Infogenesis system even though: 1) Brown told her that Jones had not done so, and 2) she had performed no investigation to determine whether her counsel to Crain was accurate and likely to exonerate him. Her text message breached the instructions and training provided by the Union. GCX 2. Under *Ogihara Am. Corp*, 347 NLRB 110, 113 (2006), *Encino Hospital Medical Center*,

360 NLRB No. 52 (Feb. 25, 2014), and others, the Board has made it clear that false statements which have the potential to adversely impact or even end another employee's employment are not protected by the Act.

The General Counsel's motive based theory clearly has no merit. MGM Grand met its burden under *Wright Line*. There is no dispute that Thomas was already on final warning for having lied during the course of an investigation – bizarrely, she continued to lie during the hearing about the subject matter of that investigation, falsely claiming that she was acting as a shop steward off the clock when she was in fact serving drinks on the floor – at the time of her termination. There is also no dispute that if Brown is credited as a witness, Thomas instructed Crain to say something she knew was not true. Brown had told her that Jones did not use the computer in any way. She did not swipe her card and she did not access the screen.[3]

The General Counsel contends that sustaining Thomas' termination would have a chilling effect, discouraging stewards from discharging their duties and aggressively representing employees. That issue, however, is not actually presented by this case. For the reasons set forth

[3] The General Counsel will claim that Brown's initial email to Zornes, GCX5, in which he used the word "acting" undermines his credibility regarding his conversation with Thomas. This is not so. Thomas conceded that she did not "know the exact words" that Brown used. Tr. 640. So the reliance on a single word – acting – is misguided. The ALJ should look at the entire conversation and realize that Thomas' claim that Brown said he saw Jones swipe her infogenesis card and attempt to ring in the order, Tr. 640-41, makes no sense. Further, when asked about the statement during the hearing, he stated that the word "acting" in GCX 5 did not mean that Jones had swiped her card and used the computer touch screen. Tr. 161. Second, if Brown had seen Jones attempt to ring in the order on the computer, he would have had no reason to insert himself and conduct an investigation. He would have known that Jones had merely made a mistake. He was three feet away. Third, Brown's stated version of events, that Jones did not use the computer, is corroborated by Crain. Brown would have had no reason to falsely state that Jones had pretended to use the computer. Fourth, and finally, Brown's testimony about his conversation with Thomas is consistent, and when considered in totality (including his undisputed rejection of Thomas' various alternative theories) strong evidence that he did not say he saw Jones act like she used the computer. Indeed, Thomas' testimony generally corroborates Brown's testimony except for her claim that he said Jones acted as if she were using the computer.

above, the General Counsel did not prove that Thomas was acting as a steward. In reality, the General Counsel proved only that Thomas held the title of shop steward when she communicated with Crain.

As such, the General Counsel would require the ALJ to adopt a new principle finding that Shop Steward communications are inherently protected, regardless of whether the steward has been asked to participate in his or her official capacity. This is contrary to established Board law. Status as a union steward grants no additional protection for misconduct outside the scope of steward duties. *See In Re of Lloyd A. Fry Roofing Co.*, 85 NLRB No. 208 (1949) (termination of union leader due to misconduct did not violate the Act, as his union representative status did not "[give] him privileges greater than those of other employees" where "conduct was of the kind that would be made the subject of disciplinary action by most employers," and no evidence existed that the employer "tolerated such conduct by its employees, whether pro-union or antiunion"); *Pinellas Paving Co*., 132 NLRB No. 85 (1961) (employee was clearly mistaken that "he was by reason of his status as shop steward immune to discipline for insubordination or misconduct"). Further, the "title of 'steward' does not make [an employee's] every action a union activity," and "[o]bviously, if a steward should make a mistake in the performance of his duty as an employee, his separate role as steward would not transform the work-related task into union activity." *Dover Energy, Inc*., 361 NLRB No. 48 (2014).

Finally, your honor need not reach any of the foregoing issues. As was set forth in MGM Grand's Motion for Summary Judgment, the General Counsel should have deferred to Arbitrator Gary Axon's Arbitration Award in which he found that Thomas had engaged in terminable misconduct and, among other things, rejected the Union's claim that Thomas had been targeted for termination because she was a shop steward. JX4. As set forth in more detail below, the issues

raised in Thomas' unfair labor practice charge – her allegedly unlawful termination – overlap completely with the issues raised by the Union during the discharge arbitration, and the Region should have deferred to the Award regardless of whether it adhered to the standard set forth in *Babcock Wilcox* or whether it applied traditional Board law.

II. STATEMENT OF FACTS

The facts of this case are essentially undisputed. There is no dispute regarding what took place between Crain and Jones. Jones did not ring in the beer before she called it. Crain did not see her ring in the beer, but gave it to her nonetheless because he assumed she had rung it in earlier. Brown observed all of this take place, and Jones' failure to ring in the beer caused him to intervene and investigate, ultimately leading him to ring the beer in himself. The next day, Brown spoke to Thomas about the situation. Thereafter, Crain was placed on suspension pending investigation.

There is no dispute that Thomas began sending Crain text messages on September 28, 2016, culminating in the final instruction to "claim" something that she knew could not be true:

> Ok. Its Very Important! **CLAIM** u saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked for.

GCX 10 (emphasis added).

There is no dispute that Thomas' only knowledge of the situation was based on the "information that [Brown] gave [her]." Tr. 641. There is no dispute that neither Crain nor Jones asked Thomas to serve as a steward before she sent the foregoing text message. There is no dispute that Thomas took no other action regarding the matter beyond sending the text. She did not attend the due process meetings. She did not contact Jones. She did not contact the Union regarding what she knew. She did not perform an investigation. And regardless of whether your honor credits her testimony that she privately intended to act as a steward, she did not "claim" to the

Company at any time that she was acting in such a capacity.

The only conflict concerns what Brown said when he spoke to Thomas. Brown was unequivocal. He never told Thomas he saw Jones swipe her card or do anything in an attempt to ring in the beer. Thomas, in contrast, says she does not remember Brown's "exact words" – meaning any effort by the General Cousnel to focus on the word "acting" is misplaced – but she claims that Brown

> said he was *standing behind a bartender* and watched a waitress swipe her card and tap on the screen like she was ringing in a drink and turned and asked the bartender for the beer and he gave it to her.

Tr. 640[4] (emphasis added).

To a large degree, the outcome of the case depends on how your honor resolves this conflicting version of events. If resolved in favor of Brown, it confirms that Thomas knowingly and intentionally told Crain to lie. If resolved in favor of Thomas, it would allow her to claim that she did not intend for Crain to lie, that she was merely reckless with the truth, and therefore she may be able to prevail if the case were analyzed under *Burnup & Sims* or as a *res gestae* case (her motive based allegation would still lose).

The resolution of this conflict is easy, however. Close review of the above quoted testimony makes that clear. There is no way that Brown told Thomas that he was *behind* Crain. That would have meant he was inside the bar – not on the stairs as all other witnesses agreed – and it would mean that he would have had no view whatsoever of Jones' alleged attempt to use the computer and swipe her card. He could not have seen her "tap on the screen" as Thomas claimed. Tr. 640. In other words, Thomas' testimony is a fabrication,

[4] Thomas gave this answer in response to a question to say "exactly what [Brown] said to her[.]" Tr. 640. She made the same claim at p. 574. In other words, this fabricated testimony was rehearsed, so that she could say it the same way, each time she was asked.

intended to make it plausible that she misunderstood/did not intentionally tell Crain to lie.

In any event, to place the case into context, a summary of facts is set forth below.

A. Background

MGM Grand is a hotel casino on the Las Vegas Strip. Much of its business involves the exchange of cash, and this case arises from an exchange that took place at one of its cash bars – the Lobby Bar, which is located near the hotel's front desk.

B. Events Leading to Charging Party's Termination.

In the morning of September 28, 2016, manager Nathan Brown was supervising a shift at the Lobby Bar at MGM Grand. As he was walking from the lounge to the casino floor, he stopped at the stair entrance to the Lobby Bar, GCX 4. While standing there, he was facing the service bar and the cocktail server's infogenesis screen. Tr. 116-7, 119. At that time, he noticed cocktail server Fontay Jones walk up to the bar and ask bartender Lee Crain for a beer. *Id.* Crain was standing across the bar from him. Tr. 119; 130 (Brown noting that the Jones' infogenesis screens would "face [him]" towards the lounge). Crain gave Ms. Jones the beer even though, to Brown's view, Jones did not ring the beer into the InfoGenesis point-of-sale system ("POS") nor provide Crain with a ticket for that beer. *Id.* After Ms. Jones delivered the beer, Mr. Brown confronted Ms. Jones. In response to his questions, Ms. Jones said she believed she already rang in the beer. Mr. Crain acknowledged that there was no ticket for the beer, but circumstances did not permit further discussion at that time. Tr. 117-122 (describing incident); 127-131.

Mr. Brown was a new manager. For that reason, he was concerned both because in a casino, all drinks need to be accounted for (even spills and complimentary beverages) and because in his limited experience, it was unusual for a cocktail waitress to obtain and deliver an alcoholic beverage without having recorded the beverage in Infogenesis. He was also inexperienced with

the suspension pending investigation process. Tr. 145-155. This inexperience led him to speak to the Charging Party when he happened upon her. *Id.*; GCX 6 (Brown statement). She was both a long term cocktail server and Culinary Workers Union shop steward who was familiar with the various potential explanations for Jones and Crain's behavior. He had a good relationship with Thomas. Tr. 150. As both Brown and the Charging Party explained, conversations about these types of issues are routine.

Brown's conversation with Thomas happened the next day at the Centrifuge Bar the next day. After an exchange of pleasantries and small-talk, Mr. Brown described the incident between Mr. Crain and Ms. Jones. Tr. 172-178; *see also* GCX 6. He told her that he witnessed Crain give Jones a beer (at first not using their names) without Jones first ringing it in. *Id.* In that regard, he was clear each time the General Counsel asked him whether he saw Jones attempt to ring it in as well as whether he told Thomas that; he said no, that did not happen and he did not say that. Tr. 174-78; Tr. 150-151; 161. He also told Thomas where he was standing, explaining that because he was in "close proximity" he was able to see that Jones had taken no action to ring in the beer, that there had been no printer error, etc. Tr. 174; *see also* 204-215 (Crain's testimony regarding what occurred); 257.

Mr. Brown then asked the Charging Party for her take on the situation. Thomas said that the conduct, if it could not be explained, might be a terminable offense. Brown therefore sought to consider and rule out possible explanations for the behavior. *Id.* The Charging Party told Mr. Brown that there were a few reasons why a server may not have rung up the beer at that time. One of those reasons was the possibility that the server may have swiped the computer screen and the computer may have had an error, which would prevent a ticket from printing. *Id.* Mr. Brown replied to her that this could not have happened because he personally observed the entire

transaction. *Id.* He told the Charging Party that he watched the entire series of events himself and the server never touched the screen. *Id.* He said he ultimately rang the beer in himself. Given those facts, the Charging Party could not offer any other plausible explanations. After additional discussion, the two parted ways. They did not discuss the issue again.

Brown had, with his coworker, referred the matter to Michelle Zornes the day before. GCX 5. brought the matter to his manager and Human Resources, and Human Resources initiated an investigation.

2. The Charging Party Tries Contacting Lee Crain.

Crain was placed on suspension pending investigation on September 28, 2016. Tr. 216-217. During the meeting, he explained what happened, saying that he had not seen Jones ring in the beer, but that he assumed she had done so earlier. Tr. 216-19.

Crain's due process meeting was eventually scheduled for October 1, 2016. The same night that he was placed on SPI, however, the Charging Party began calling him. GCX 11 (Crain statement); Mr. Crain received four or five calls from a number that he did not recognize, so he did not answer. *Id.* The caller did not leave a message. *Id.*

The next day, September 29, 2016 at 2:41 p.m., Mr. Crain started receiving texts from the same number. *Id.*; GCX 10. The texts read "It's Cynthia [sic] [right] away." *Id.* Then, at 11:53 p.m., Mr. Crain received another that read "Hey It's Cynthia can you call me[?]" *Id.* Both of these texts went unanswered. The next day, Charging Party continued texting Mr. Crain at 12:33 P.M. and said "Lee. ... It's Cynthia. Call me[.]" *Id.* Mr. Crain responded and said "Will do in a meeting[.]" *Id.*

The Charging Party then texted "**Ok. It's very important.!! Claim U saw her entering stuff on the computer and you figured the printer failed so you gave her the beer she asked**

for[.]" *Id.* (emphasis added). The "meeting" that Mr. Crain was referring to was his due process meeting with Human Resources regarding the Ms. Jones incident. GCX 10. As Crain explained, he received the initial messages while he was waiting outside of the Human Resources office and the second one appeared to him while he was in the due process meeting, on his Apple Watch. Tr. 275-76.

Crain had not contacted Thomas. Tr. 272. He had not asked her to serve as a shop steward. Neiter had Jones or any other individual. Mr. Crain, as the recipient of this text, understood this text message to be a direction from the Charging Party to lie to Human Resources by claiming that the printer behind the bar failed to print. Tr. 260-272; GCX 11. Mr. Crain understood the Charging Party's text as directing him to say something that was not true, putting him at risk for termination because, as he knew from prior experience, dishonesty during an investigation is grounds for discharge.5

Mr. Crain, however, did not comply with the Charging Party's instruction. Indeed, it was Mr. Crain's belief that if he followed the Charging Party's instructions and told a fabricated story he would have been fired. *Id.* Instead, he brought the text messages to the attention of one of his Union's shop stewards. This steward brought the matter to the attention of another steward, Randy West. Mr. Crain met with Mr. West and discussed their mutual concerns regarding the text messages. After that, they took the matter to general manager Dan Groesbeck. *Id.* Mr. Groesbeck forwarded this information to Monica Dorsey, the Executive Director of Food and Beverage and Human Resources who then began an investigation.

[5] The General Counsel will argue that Thomas' texts did not interfere with the investigation because Crain did not take her advice. That argument is not based in reality. It is clear that her text message was intended to coach Crain regarding his statement during the investigation.

3. Human Resources' Investigation and Recommendation.

After Human Resources was made aware of the issue on October 1, 2016, Maureen Keefe-Wiseman, Employee Relations Business Partner, conducted the investigation. Ms. Keefe-Wiseman understood that Mr. Crain and Mr. West alleged that Thomas' text appeared to instruct Crain to be dishonest during an investigation, thereby interfering with the investigation, and that the incident was similar to the incident earlier in 2016 when Thomas was given a final warning and nearly terminated. Accordingly, the Company placed the Charging Party on SPI on October 3, 2016. *Id.*

Keefe-Wiseman had conducted the investigation into the Crain/Jones incident. She had conducted Lee Crain's due process meeting. Based upon her review of the text messages and being the Human Resources officer that handled the Crain/Jones beer situation, Ms. Keefe-Wiseman reached the preliminary conclusion that the Charging Party was instructing Mr. Crain to be untruthful. This was based on the literal wording of the text and her knowledge of the Crain/Jones incident. No one involved in the Crain/Jones incident said that the printer failed. *Id.* Additionally, general manager Dan Groesbeck reviewed surveillance footage and indicated that the printer did not fail. *Id.* In sum, Ms. Keefe-Wiseman was aware of no information that could provide a reasonable explanation for the Charging Party's text instructions other than to lie. *Id.*

On October 7, 2016, Ms. Keefe-Wiseman convened a due process meeting for the Charging Party. The meeting was attended by herself, shop steward Tamara Pastore, and Michelle Zornes, Executive Director of Beverage. During the meeting, Ms. Keefe-Wiseman asked the Charging Party whether she recalled directing Mr. Crain to claim that he saw Ms. Jones attempt to enter the drink order into Infogenesis. Charging Party responded that she recalled sending the text messages to Mr. Crain but she did not direct him to be dishonest. Ms. Keefe-Wiseman also asked whether

the Charging Party had a copy of the text messages. The Charging Party claimed that she deleted them and said that she did not save a copy for herself. *Id.*

During the course of her discussion with the Charging Party, Ms. Keefe-Wiseman learned for the first time that the Charging Party discussed the Crain/Jones situation with Nathan Brown on September 28, 2016. When the Charging Party brought that conversation up, she said that Brown saw Jones on the computer but Crain gave Jones a beer even though no beer had been rang in. However, Ms. Keefe-Wiseman said that did not make sense because the whole reason this sparked as an interview is because Brown specifically saw the bartender give out a drink that had not been rung in. To put it another way, if Brown had in fact seen Jones at the computer and then saw Crain give her a beer, he would have never spoken to Ms. Thomas. He would not have done anything all because that was not a departure from procedure. In other words, the Charging Party told Ms. Keefe-Wiseman that Brown saw Jones ringing in the beer, even though Brown saw and told the Charging Party the exact opposite.

At the end of the meeting, Keefe-Wiseman asked Thomas if she would like to submit a statement. GCX 3 (Keefe-Wiseman's notes). Thomas chose not to submit a statement.[6]

As a result, Ms. Keefe-Wiseman spoke to Mr. Brown, obtaining both a summary of what he saw occur and a summary of his conversation with Ms. Thomas. He contradicted the Charging Party's story, making it very clear that he had informed her that his suspicions were triggered by the fact that he had not seen Ms. Jones use the computer. He provided Keefe-Wiseman with a

[6] Thomas claimed that she was not asked for a statement and the General Counsel appears to intend to emphasize that fact. Thomas, however, clearly knew she could submit a statement. She was a shop steward and she had submitted a statement regarding the incident that nearly caused her termination earlier in 2016. In any case, Thomas was given a full opportunity to give her side of the story during the due process meeting. She chose not to submit a statement, and in all likelihood, she did so to avoid being pinned down to one version of events.

detailed summary of the conversation. GCX 5.

Next, Ms. Keefe-Wiseman called Fontay Jones on October 14, 2016. Ms. Keefe-Wiseman wanted to know if Ms. Jones advised the Charging Party that the printer did not work during the Crain/Jones beer incident. Ms. Keefe-Wiseman was trying to get to the bottom of these facts because she wanted to ensure Jones had not spoken to Thomas about the situation. However, during their call Ms. Jones said that she had not spoken to the Charging Party at all. They had never spoken about the incident with Mr. Crain. At this point, there appeared to be no reasonable explanation for the Charging Party's instruction other than to obstruct the Company. Thus, Ms. Keefe-Wiseman concluded that the Charging Party intended to interfere with an ongoing Company investigation. This violated multiple Company codes of ethics and conduct standards.

Ms. Keefe-Wiseman presented her investigation and findings to the department leaders, Monica Dorsey and Michelle Zornes. RX 10. Ms. Dorsey's consideration of the facts was thorough and thoughtful. She considered the Charging Party's prior history, her live three day suspension[7], the dishonesty inherent in that suspension, and the facts established by Ms. Keefe-

[7] At the time of these events, the Charging Party had an active disciplinary action for dishonesty. On January 8, 2016, the Charging Party worked off-the-clock for approximately 45 minutes at a service bar at MGM Grand and allowed her underage daughter to wait in the service bar, both of which are prohibited. While these infractions were likely deserving of discipline on their own, the Charging Party compounded her offenses when she was dishonest during the Company's investigation. According to Monica Dorsey, Executive Director of Food and Beverage at MGM Grand, the Charging Party lied to the Company as to why and how long she worked off the clock. Specifically, the Charging Party said that she only worked off-the-clock for a short time to help a co-worker that did not know how to handle a transaction. *Id.* However, after additional investigation by the Company, MGM discovered that the Charging Party's explanation was false and she allowed her daughter behind the bar, which she omitted from telling the Company. The Company also discovered that the Charging Party worked at another employee's station and collected that employee's gratuities, which Ms. Dorsey described as "literally taking money away from a co-worker working outside of her station."

While Ms. Dorsey believed that the Charging Party's dishonesty in January 2016 warranted immediate termination, she decided to give the Charging Party a second chance based upon her

Wiseman's investigation. She reviewed the text message, Mr. Crain and Mr. West's statements, and the explanation that the Charging Party provided during her due process meeting. She considered the context of the situation, including Ms. Thomas' decision to insert herself into a situation, Ms. Thomas' false account of her discussion with Mr. Brown, and the fact that Ms. Thomas never made any effort to verify the accuracy of her instruction to Mr. Crain to "claim" that he saw Ms. Jones enter the order into the computer. These acts violated Article 18.01 of the CBA which establishes that "dishonesty" is a terminable offense.

B. The Arbitrator's Award

On April 2, 2018, the arbitrator issued an award denying and dismissing the Charging Party's grievance, finding that MGM "proved by clear and convincing evidence just cause for the October 18, 2016 discharge of Grievant Cynthia Thomas." JX 4 at p. 14. The arbitrator noted that the Charging Party "admit[ted] she sent the text message to Crain," who "brought it to management's attention because Grievant's instructions were not factually accurate." *Id.* at p. 16. Per Crain's testimony, he "believed Grievant was telling him to lie during the investigation." *Id.*

The Charging Party claimed that her text, as written, did not direct Crain to lie, and that she had not intended to do so. This argument was unsupported, and the arbitrator found that an "examination of the plain language in the text shows it is clearly written and extremely incriminating." *Id.* In fact, the "Grievant was given ample opportunity to present a rational explanation for the explicit instructions conveyed to Crain in the message yet failed to do so." *Id.*

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length of service with the Company. She issued a three-day suspension instead on January 8, 2016. The suspension put the Charging Party on specific notice that similar conduct would lead to termination. Dishonesty is called out in the notice. Pursuant to CBA § 18.04, disciplinary suspensions remain active in an employee's file for one year. Thus, according to the terms of the CBA the Charging Party's three-day suspension was still "live" when she interfered with the Company's investigation on or about September 29, 2016.

The arbitrator was not persuaded by the Charging Party's argument that the narrative contained in her text message was true based on her claim that "Brown told her Crain gave Jones the beer because Crain had seen Jones was on the computer and thought it had been rung up." *Id.* at p. 17. The arbitrator found that Brown credibly testified to the exact opposite:

> When Brown sought Grievant's counsel as a Shop Steward he recalled engaging in a de-tailed discussion about the Crain/Jones incident. Brown told Grievant he witnessed Jones getting a beer from Crain without first ringing it up. Grievant played devil's advocate, positing situations where a server might not ring up a drink order at the time the drink was delivered. Brown told Grievant that none of the possible scenarios she proposed had occurred. He specifically said he ended up ringing in the beer himself. Brown's testimony during arbitration and his two statements to management were consistent with his explanation of what he witnessed with Crain/Jones and the content of his ensuing conversation with Grievant. [citations omitted]. Crain's version of events corroborated Brown's version. Crain did not see Jones at the computer and there was zero evidence the printer had been malfunctioning. [citations omitted]. Therefore, I find nothing in the record evidence to lead your Arbitrator to conclude Brown bore any animosity toward Grievant or that he had a motive to be untruthful during the investigation.

Id. at p. 17-18.

Further, the arbitrator placed particular emphasis on the Charging Party's testimony about why she deleted this incriminating test message, finding her explanation was not credible:

> When pressed about when and why she deleted the text message her testimony vacillated from an assertion she always deletes text messages to free up phone memory space to claiming she <u>only deleted unimportant messages</u>. Her text message to Crain started, "<u>OK, it's very important.!!</u>"

Id. at p. 18 (emphasis in original).

While the Charging Party relied on medical conditions as "justification for an inability to fully or accurately remember certain key facts," the arbitrator noted that at the time of the subject events, she had been released to work without restrictions, and admitted that she had not taken any

medication while at work, and was not impaired. *Id.* at p. 19. Further, her subsequent extensive efforts, including seeking extra work hours, engaging in a lengthy discussion with Brown, and making eight attempts to contact Crain over the next two days were "not consistent with that of someone who was overwhelmed by illness and impaired by medication[.]" *Id.* at p. 20.

Based on this evidence, the arbitrator concluded: "I hold the record evidence before me is consistent with a theory of guilt and inconsistent with any reasonable theory of innocence. Your Arbitrator concludes the Employer proved through clear and convincing evidence Grievant intended to instruct Crain to lie to management during a Company investigation meeting." *Id.* at p. 20. To that end, the Arbitrator found under Article 18.01(a) of the CBA that the Charging Party's blatant and dishonest interference with the investigation justified her "immediate discharge for dishonesty." *Id.* at p. 23-24; *see also* Exhibit 5. The CBA's "clear and unambiguous" language "reflect[ed] the understanding that some incidents of misconduct are so severe that immediate discharge is appropriate." *Id.*

III. CREDIBILITY

Before addressing the legal merit of the General Counsel's claims, the ALJ must resolve a number of credibility issues. The Complaint turns on Thomas' credibility. Unless her testimony is fully credited with respect to her conversation with Brown and with respect to her statements in the due process interview – specifically her claim that she put the Company on notice that she was acting as a steward – the General Counsel's *res gestae* and *Burnup & Sims* theories must be dismissed, leaving a borderline frivolous claim that Thomas was discharged with an unlawful motive.

Credibility determinations rely on a variety of factors, including the consistency of the witness' testimony, demeanor, established or admitted facts, inherent probabilities and reasonable

inferences that may be drawn from the record as a whole. *See, e.g.*, *Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

Thomas is not a credible witness. She has testified about the text messages to Crain, the due process meeting, and her conversation with Brown on two different occasions. She also gave the Region multiple affidavits and other documents during its investigation. The only conclusion one can draw from her statements, when they are taken together, is that Thomas' story is inconsistent and changes in order to suit her needs.

First, Thomas version of her conversation with Brown does not make any sense. As noted above, she claims that Brown told her that he witnessed the transaction while standing behind Crain. That would have placed Brown inside the bar, and unable to view Jones' screens. But Crain, like Brown, is clear that Brown was on the other side of the bar, and the rest of Brown's version of events (which Thomas corroborates), such as intercepting Jones, and then ringing in the beer, makes sense *only* if he is in the lobby bar area. The fact that Thomas gave this obviously false testimony on two occasions, in a very practiced way, undermines her credibility regarding what Brown said to her.

Second, although Thomas repeatedly testified that she contacted Crain as a steward, she admits that he nor Jones contacted her. Tr. 624-25. This claim is also conspicuously absent from her notes regarding the due process meeting, Tr. 620-23, and Pastore's notes. RX 12. It is also missing completely from her NLRB affidavit. 654-55. And, while omissions are not always the strongest evidence, in this case they are entitled to weight. Thomas' insistence that she was acting as a steward overwhelmed her testimony. She mentioned it dozens of times. If she is telling the truth, rather than adapting her story to the General Counsel's theory, it is inconceivable that she

would not have mentioned it at least once in the due process meeting and at least once in her NLRB affidavit.

Third, it is implausible that Thomas, if acting as a steward, would not have followed up with Crain, or at a minimum, the Union, regarding Crain's due process meeting, but that is what happened. She made no effort whatsoever to contact Crain again, and instead of keeping a record of her activity, she deleted her text messages. Tr. 628-30.

Fourth, when pressed, Thomas refused to state with specificity that she informed the Company that she was acting as a steward. 654-55. She was evasive, and ultimately conceded she could not recall the conversation and may not have used that phrase. *Id.* Again, this testimony is at best implausible. If Thomas was acting as a steward, she would have said so, and she would remember having said so.

Further, as Arbitrator Axon observed, and as repeated itself in the hearing before your honor, Thomas' memory failed in suspicious ways. During the arbitration hearing, Thomas claimed, on direct testimony, that she did not intend to instruct Crain to lie. JX 4; 645-649. On cross examination, however, she claimed that she could not remember sending the text at all, let alone her intent. *Id.* Obviously, those claims are mutually exclusive. Thomas cannot both remember that her intent was to act as a shop steward and counsel Crain to think through his process, and at the same time be unable to recall sending the message itself. Shockingly, however,

Thomas repeated the same behavior in the hearing. In response to questions from the General Counsel, she claimed that she did not intend for Crain to lie. On cross-examination, she claimed she could not remember sending the text, Tr. 636, and also evasively claimed she could not recall what the text said. Tr. 631-32. When pressed, she was unable to state which portion of the text was intended to convey her hope that Crain would think through his process. Tr. 635,

GCX 10.

Thomas's decision to delete the text messages, GCX 10, destroying evidence also undermines her credibility, particularly because her testimony regarding her supposed practice is inconsistent and contradicted by her own testimony. Tr. 628-30, 634, 649. She claimed she deleted it because it was unimportant, but the text itself said that it was important. She claimed she deleted it because she did not need it anymore, but she bizarrely kept the text messages relating to Steve Ford, keeping them up until the date of the hearing. She claimed she deletes all her texts, but again, she did not do so with respect to Steve Ford. It is well-accepted that destroying evidence of potential wrong-doing, which is exactly what Thomas did here, indicates that a witness should not be trusted. Indeed, it warrants an adverse inference.

Finally, Thomas' version of events in the due process interview is further undermined by the General Counsel's failure to corroborate her testimony with Pastore. *See, e.g., Precoat Metals*, 341 NLRB 1137, 1150 (2004) ("absence of corroboration is a factor, in some instances a most persuasive one, for determining whether testimony should or should not be credited.") (*citing SCA Services of Georgia*, 275 NLRB 830, 832-833 (1985)); *W. Irving Die Casting of Ky.*, 346 NLRB 349, 352 (2006) (citing *C&S Distributors*, 321 NLRB 404, fn. 2 (1996)). Indeed, Pastore neither corroborated Thomas' claim that she told Keefe-Wiseman that Brown had said that Jones used the computer, nor corroborated Thomas' claim that she told the Company she was acting in a representative capacity when she texted Crain. Tr. 37-97. The General Counsel's failure to ask such questions of a witness within her control and who presumably would give positive testimony if it were true weighs against Thomas' quality as a witness.

IV. ARGUMENT

A. Neither a Res Gestae Nor Atlantic Steel Analysis Apply. The Board Has Already Found That False Statements Which Have The Potential To Impact Or End A Coworker's Employment Are Not Protected By The Act.

The General Counsel contends that Thomas' effort to communicate with Crain is protected, and therefore she is subject to discharge only if her instruction to Crain to lie was so egregious that it lost the protection of the Act. See, e.g., Desert Cab, 367 NLRB No. 87 at slip op. 13 (Feb. 8, 2019). The contention is contrary to the facts. Thomas was not engaging in protected activity.

The Board recently clarified the meaning of "concerted activity" in *Alstate Maintenance,* 367 NLRB No. 68 (January 11, 2019). In confirmed that activity is concerted only when it is "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* (citing *Meyers I*, 268 NLRB 493, 496 (1984)). Thomas' text messages to Crain clearly were not "with or on the authority of other employees." *Id.* As discussed above, she was not acting in her capacity as a shop steward. Neither Crain nor anyone else ever requested her services. Her testimony at the hearing notwithstanding, she never claimed to the Company at any time that she was acting as a steward. Indeed, the Shop Steward training documents introduced by the General Counsel establish that Thomas did not do any of the things she had been trained to do. She did not investigate. She did seek to caucus with Crain or Jones to learn the facts. She did not counsel Crain to "tell the truth." Thomas instructed Crain to tell a story without regard to its truth or falsity. She was acting on her own accord, unsolicited.

For similar reasons, even if one assumed that Thomas' actions were concerted, under *Alstate Maintenance*, they were not for "purpose of mutual aid and protection." Again, whatever Thomas' motivations may have been, they were her own. Thomas' advice to Crain recklessly disregarded the truth. She was not solicited to participate. She did not perform a good faith

investigation.

The principle advanced by the General Counsel – that a shop steward is protected and insulated from the consequences of her actions at all times, and whenever she communicates with a coworker, simply because she is a shop steward – is not recognized by Board law. A shop steward's communications are not "inherently concerted." They are not inherently "for purpose of mutual aid and protection." Shop steward status is not a talisman that converts every workplace communication into protected concerted activity. If Thomas had been asked to serve as Crain or Jones' steward. Or if she had claimed she was doing so and informed the Company of that fact, the General Counsel's preferred analytical framework might apply. But that is not this case.

B. The *Burnup & Sims* Framework Does Not Apply

The General Counsel also contended that the case should be evaluated under *Burnup & Sims*' framework. Under *Burnup & Sims*, an employer violates the Act if (i) the discharged employee was at the time of the alleged misconduct "engaged in a protected activity, (ii) the employer knew the employee was engaged in a protected activity, (iii) the alleged misconduct during that protected activity provided the basis for discipline, and (iv) the employee was not, in fact, guilty of that misconduct. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964).

As noted above, Thomas' text message to Crain was not protected concerted activity under the Act. Even if it were, however, there is no evidence in the record that MGM Grand knew Thomas was engaged in protected conduct. Thomas herself did not testify that she had done so. When confronted with that question on cross-examination, she was evasive, answering in the affirmative only after the ALJ prompted her to do so, Tr. 637-38, and even then refusing to say she used the words "shop steward." This is critical. The Supreme Court's decision *explicitly* provides that MGM Grand cannot be held liable under the Act unless it was on notice that she was

doing so.

C. The Complaint Should Be Dismissed Even If Thomas' Conduct Is Protected And Concerted And Analyzed Under *Burnup & Sims* Because Thomas' Instruction To Lie Constitutes Misconduct

In *Ogihara Am. Corp*, 347 NLRB 110, 113 (2006), *Encino Hospital Medical Center*, 360 NLRB No. 52 (Feb. 25, 2014), and others, the Board has made it clear that false statements which have the potential to adversely impact or even end another employee's employment is not protected by the Act.

Thomas' text to Crain clearly constitutes a statement outside the protection of the Act. If Brown is credited as he should be, and as the Arbitrator concluded, Thomas purposefully disregarded everything Brown said about the transaction and instead counseled Crain to provide a story that was false. Brown's statement to Human Resources, his testimony at the Arbitration, and his testimony during the hearing was unequivocal: he did not see Jones swipe her infogenesis card. He did not see her attempt to ring up a drink on the computer. He did not see a ticket print out. And he rang the drink in himself. Crain's testimony was the same: Jones did not attempt to ring in the drink. She did not touch the computer. She simply called for a beer.

There is no doubt that Thomas was instructing Crain to lie. She wrote the text message in the imperative and Crain certainly understood it that way. He has testified repeatedly that Thomas told him to say something that did not happen, and his anger over the situation, when coupled with Randy West's reaction to the situation, is strong evidence that Thomas' conduct exceeded acceptable standards at the MGM Grand and exceeded any reasonable standard for shop steward behavior. West called her conduct "reprehensible." Indeed, had Crain adopted Thomas' version of events, he would have been subject to termination because he would have provided materially false statements during the course of an investigation.

There is no dispute that Ms. Thomas had no basis whatsoever for giving Mr. Crain this instruction. She performed no investigation. She had not spoken to Mr. Crain. She had not spoken to Ms. Jones. She had spoken only to Mr. Brown, and both his testimony and contemporaneous statement are unequivocal: he never saw Ms. Jones ring in the beer and he told Ms. Thomas that. Indeed, that is the reason he approached her; he believed that he had observed theft and he was consulting with an experienced Shop Steward about possible alternative explanations for what he had witnessed. Under the circumstances, there was no legitimate reason for Ms. Thomas to instruct Mr. Crain to assert that he had seen something that he had not. Indeed, the only reason for Ms. Thomas to have given Mr. Crain this instruction was mentioned by Thomas herself and by Mr. West: if Ms. Jones had not rung in the drink, she was stealing and it was a terminable offense. Mr. Crain's failure to obtain the ticket was nothing more than a policy violation which would have led to progressive discipline. Importantly, if Ms. Thomas' efforts were sincere and forthcoming, why did she not make contact with Mr. Crain's steward? Why didn't she continue to follow up with Mr. Crain? Why did she make no effort at any time to contact Ms. Jones?

Thomas has never offered a reasonable explanation which would come close to justifying the text message's content or her decision to send it. She admonished Mr. Crain to make a false statement during his due process interview. Thomas' assertion that Mr. Crain was friendly towards her makes the situation worse, not better; it makes it more likely that he would have relied on her guidance. The meaning and intent of the text is plain and confirmed by the words Thomas chose to express herself, Mr. Crain, Mr. West and any other person who reads it. Thomas gave conflicting testimony, but she ultimately did not contest the meaning of her text, and her attempt to contest the intent was defeated by her testimony that she could not recall sending it or the circumstances.

If Thomas were acting as a steward, she could have texted Crain and asked him to talk. She would have contacted Jones. She could have approached Crain at work. When he did not respond, she could have contacted the union. But she did not do any of these things. She never took any action – before or after – to contact Mr. Crain and offer an alternative explanation.

Instructing Mr. Crain to make a false statement is, self-evidently, dishonest within the meaning of Article 18.01 of the CBA. It is self-evidently, misconduct under Board law. Instructing him to do so in order to interfere with an investigation constitutes misconduct within the meaning of Article 18.01 of the CBA. Both actions violate clearly established and articulated rules of conduct which have been validly promulgated by the Employer; rules which because of their nexus with the investigation process have special applicability to a Steward like Thomas. There is no doubt that Thomas was aware of these obligations. Beyond her practical experience with investigations and the rules, she had received specific warning just eight months earlier when she was suspended for three days – and very nearly terminated as Monica Dorsey explained – due in part to her dishonesty at work and in the course of that investigation.

Even if the Charging Party spoke to Crain in her capacity as a shop steward (which clearly did not occur here), her instruction to lie to management unquestionably occurred outside the protection of the Act. Where "an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995) (citing *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). As is particularly relevant to this case, the Board has held that "deliberate falsity" is sufficient for "an employee to lose the protection of the Act." *Ogihara Am. Corp.*, 347 NLRB 110, 113 (2006). In *Ogihara*, an employee engaging in protected activity

(mailing a complaint to management) "lost the protection of the Act because of his intentional falsification of the name of the sender of the package." *Id*. Even though the employee only falsified the name of the sender because he feared retaliation if his identity was discovered, such "deliberate deception was so egregious as to remove the sending of the package from the protection of the Act." *Id*. Here, even if the Charging Party's general communications with Crain were protected activity, her instruction to lie to management is the exact type of deliberate deception and falsity which must lose protection of the Act under *Ogihara*.

Further, "the standard for determining whether specified conduct is removed from the protections of the Act [is] as articulated by the Board: communications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character **as to render the employee unfit for further service**." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007) (emphasis added). An individual who has demonstrably instructed another employee to lie to management clearly cannot be fit for further service. Again, the Charging Party's conduct was not protected in the first place, but even if it was, the egregious nature of her falsity unquestionably lost protection of the Act.

Thomas' amnesia, both at the hearing and during her arbitration hearing, was simply too convenient. In reality, Thomas knew she was caught from the beginning. She destroyed her copies of the text messages with hopes that it would impede the Company's investigation into her conduct. The gravity of Ms. Thomas' actions cannot be overstated. They go to the core of the employer-employee relationship, undermine the integrity of the investigation process, and could have easily caused Mr. Crain to be terminated for attempting to cover-up an incident which would not have otherwise led to discipline. Thomas' actions warranted summary termination without progressive discipline under the CBA. And even if it did not, her live three day suspension for dishonesty and

misconduct confirmed that she has been given fair opportunity to improve. No lesser discipline was appropriate.

D. The General Counsel's Motive-Based Theory Has No Merit. MGM Grand Met Its Burden Under *Wright Line.*

The General Counsel's final theory is that MGM Grand terminated Thomas with an unlawful motive. There is no reason to reiterate the discussions set forth above. To meet its burden, MGM Grand was only required to show that it reasonably believed that misconduct was committed, and that its subsequent actions were consistent with its policies and practices. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (2012). It clearly did so. To the extent Thomas engaged in protected concerted activity regarding Loser's Lounge – and the record is less than clear in that regard – there is no evidence tying that situation to her termination. *See, e.g., Neptco, Inc*., 346 NLRB 18, 20 (2005). The Company did not trump up Thomas' text message to Crain. Nor did it encourage Crain to report it. The Company became aware of Thomas' conduct independently, and due to Crain's own actions.

Under *Wright Line*, employers can defeat an unfair labor practice allegation by producing "evidence of a 'good' reason for the discharge." *Wright Line*, 662 F.2d at 904-907. The employer satisfies this if two elements are met: 1) "management reasonably believed those actions [constituting the misconduct] occurred," and 2) "the disciplinary actions taken were consistent with the company's policies and practice." *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d at 435-36. The first element is solely focused on the employer's reasonable belief, and if met, "then [the employer] could meet its burden under *Wright Line* regardless of what actually happened." *Id*.

The Company met its burden. The General Counsel's belief to the contrary, that Thomas was terminated in retaliation for her work as a steward and/or because of other protected concerted

activity is "mere speculation without a jot of evidentiary support in the record." *Jackson Hospital Corp.*, 647 F.3d 1137, 1142 (D.C. Cir. 2011).

E. Deferral to the Arbitrator's Award Is Mandatory Pursuant to *Babcock*.

The Board "will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." *Babcock & Wilcox Constr. Co.*, 361 NLRB No. 132, 2014 NLRB LEXIS 964, *20 (2014).

1. The Parties Explicitly Agreed that The Arbitrator Was Authorized to Decide the Statutory Issue.

As arbitration is a "consensual matter," the Board "should not defer to an arbitrator's decision unless the arbitrator was specifically authorized to decide the unfair labor practice issue." *Babcock*, 2014 NLRB LEXIS 964 at *22. Here, the parties specifically authorized the arbitrator to decide the statutory issues, as memorialized in the Region's December 30, 2016 letter to the parties advising of the prearbitral deferral. This letter indicated: "Because **the parties have explicitly authorized the arbitrator to decide the statutory issues in this case**, the Board's deferral standards applicable in this case are those set forth in *Babcock*." (emphasis added). Thus, it cannot be disputed that the parties explicitly authorized the arbitrator to decide the statutory issues. Notably, the Region's correspondence further indicated that the "Charging Party may appeal [the] decision to defer this charge by filing an appeal." *Id.* The Charging Party did not file an appeal or otherwise refute the referenced agreement, further showing that the arbitrator was, in fact, authorized by the parties to decide the statutory issues.

2. The Union Acted Affirmatively to Prevent The Arbitrator from Being Presented With and Considering the Statutory Issues.

Deferral pursuant to *Babcock* additionally requires that "the arbitrator was presented with and considered the statutory issue, **or was prevented from doing so by the party opposing deferral**." *Babcock*, 2014 NLRB LEXIS 964 at *20. (emphasis added). Although the Union is not a party to this proceeding, it, as the charging party's representative, prevented the Arbitrator from considering the statutory issues in this case. On November 9, 2017, before the first day of hearing, MGM's counsel sent a request to Union counsel requesting that the statutory issues be submitted to the arbitrator. The Union refused to submit the statutory issues to the arbitrator, and, based on this refusal, the statement of issues each party submitted at arbitration did not include the statutory issue. The Union's refusal clearly prevented the arbitrator from being presented with and considering the statutory issue, satisfying *Babcock*'s second requirement for deferral.

3. The Arbitrator's Award Constitutes a Reasonable Application of Relevant Statutory Principles, and Thus Board Law Reasonably Permits the Award.

Deferral is appropriate "if the party urging deferral shows that Board law reasonably permits the arbitral award," meaning that "the arbitrator's decision must constitute a reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case." *Babcock*, 2014 NLRB LEXIS 964 at **33-34. The "arbitrator, of course, need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act **could** reach." *Id.* (emphasis added).

Though the arbitrator did not explicitly consider the statutory issues[8], his analysis (wherein

[8] This, of course, does not preclude deferral, as *Babcock* specifically contemplates deferral may be proper where the arbitrator was prevented from considering the statutory issues. In fact, the Board specifically "decline[d] to adopt the General Counsel's position that deferral is

he found overwhelming evidence that MGM had a valid reason for discharging Thomas) is identical to the analysis the Board would perform if presented with the case. To demonstrate that an employee was disciplined for engaging in protected concerted activity under the Board's *Wright Line* test, the General Counsel must first establish a *prima facie* case that the employee was subjected to an adverse employment action and that the employee's protected conduct was a motivating factor. 251 NLRB 1083 (1980), *enfd. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). However, even if this *prima facie* case is established, the employer may nonetheless prevail if it can "produce evidence of a 'good' reason for the discharge." *Id.* at 904-907.

First, as required by *Wright Line*, the arbitrator analyzed whether any protected conduct motivated adverse action taken against Thomas, finding as follows:

> Your Arbitrator does not agree with the Union's assertion Grievant was punished for engaging in Shop Steward duties. This is not a case of an over zealous or vigorous Shop Steward advocating on behalf of a member. Protections for engaging in Union activities do not extend to an employee or Shop Steward who is dishonest during an employer investigation.

Id. at p. 24. The arbitrator's analysis and finding that dishonesty is not protected activity was similar, if not identical, to the analysis the Board would perform if presented with the case. *See Fresenius USA Mfg.*, 362 NLRB No. 130 (2015) ("false statements to [an] employer [are] not protected activity," and "dishonesty during the investigation . . . [is] not itself protected by the Act"); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 930 (1995) (activity that would ordinarily be protected under the Act may lose its protection if it "includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods"); *United Parcel Service of Ohio*, 305

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warranted only if the arbitrator 'correctly enunciated the applicable statutory principles and applied them in deciding the issue.'" *Babcock*, 2014 NLRB LEXIS 964 at *30.

NLRB 433 (1991) (upholding arbitrator's finding that Union steward terminated for making false statements on grievance report, lost protection of the Act because "false orchestrated statements" were deliberate and evidenced bad faith).

Even assuming for the sake of argument that the Charging Party established a *prima facie* case that her termination was motivated by her protected conduct (which is clearly not the case here), the Arbitrator's finding that MGM had a valid reason for discharge clearly satisfied *Wright Line's* requirement that the employer provide "evidence of a 'good' reason for the discharge." 662 F.2d at 904-907. Where discharge is based on misconduct, the employer satisfies this if two elements are met: 1) "management reasonably believed those actions [constituting the misconduct] occurred," and 2) "the disciplinary actions taken were consistent with the company's policies and practice." *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (2012). The first element is solely focused on the employer's reasonable belief, and if met, "then [the employer] could meet its burden under *Wright Line* regardless of what actually happened." *Id.*

As set forth above, the arbitrator engaged in a well-supported factual analysis of MGM's reasonable belief that Thomas had committed misconduct, including the plain language of the text message itself and the testimony of both Brown and Crain clearly showing that Thomas sought to falsify information related to an investigationEven though the Charging Party's text message clearly showed she intended Crain to lie, the arbitrator carefully considered the Charging Party's exculpatory arguments. The arbitrator found that her own contradictory and unbelievable testimony precluded any other explanation for her conduct. *Id*. Certainly, the arbitrator's analysis showed that MGM reasonably believed that misconduct was committed.

Next, the arbitrator specifically analyzed MGM's applicable policies and procedures, finding that MGM's termination of Thomas was consistent with these policies and supported by

Article 18.01(a) of the CBA, which allows immediate discharge for such blatant acts of dishonesty. *Id*. This is the exact *Wright Line* analysis (as noted by *Sutter*) the Board would have performed if presented with the case. The General Counsel cannot reasonably claim that shop stewards are immune from discipline when they encourage employees to be dishonest, nor can the General Counsel claim that shop stewards cannot be held accountable for complying with the collective bargaining agreement. Indeed, Board law is to the contrary.[9] *See, e.g., John Morrel & Co.*, 270 NLRB 1, 9 (1984) ("The importance of deferring to the "industrial common law… of the industry and the shop" created through the arbitration process cannot be overemphasized. In their many years of creating that "common law of the shop" arbitrators have recognized almost unanimously that stewards and other union officials have a higher duty than rank-and-file employees to adhere to the terms of a collective-bargaining agreement."); *Consolidation Coal Co*., 263 NLRB 1306, 1320-1321 (1982) (discussing no-strike clauses and quoting *United Parcel Service, Inc*., 47 LA 1100--01 (1966)) ("If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to

[9] The Employer notes that Counsel for the General Counsel has suggested that the Arbitrator held the Charging Party to a higher standard because she was a shop steward. This is nonsense. The Charging Party already had a *live* three day suspension for dishonesty on her record at the time of her termination. She was not entitled to additional progressive discipline. Moreover, the Arbitrator's determination was dictated by the terms of the collective bargaining agreement. Once he concluded that Thomas was dishonest, he was obligated to find that the Company met its burden of showing just cause because Article 18.01 specifically provides for discharge in such circumstances. There is no indication that the Charging Party's status as a shop steward was considered an aggravating factor or was relevant to the severity of the discipline imposed. It was simply a fact, part of the record.

set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer[.]").

Babcock requires only that the arbitrator's award be a decision that the Board *could* reach. It cannot be disputed that this requirement is satisfied here. *Babcock*, 2014 NLRB LEXIS 964 at **33-34. The evidence of the Charging Party's dishonesty was overwhelming. The arbitrator's dismissal of the grievance was clearly the only reasonable decision. The Board would have reached the same result if presented with the case.

C. If *Babcock* Does Not Mandate Deferral, The Board Should Reconsider Its Standard for Deferral and Return to the Traditional Standard Set Forth in *Spielberg/Olin.*

As set forth above, the current case satisfies *Babcock*'s deferral requirements, and the Board should thus defer to the arbitrator's decision. However, if the Board applies *Babcock* and finds that deferral is not proper, MGM submits that there is defect in *Babcock* itself. Such a result would be contrary to the purpose of deferral, which is avoiding unnecessary and duplicative litigation of factual issues. Without reiterating facts set forth above, this case is the precise kind of case that should be disposed of via deferral. The Charging Party was terminated in 2016. The evidence of her dishonesty, including past discipline for dishonesty, warranted termination.

Babcock's infirmities are set forth in detail in Members Miscimarra and Johnson's partial dissents to that decision. 361 NLRB No. 132, slip op. at 14-24. There is no reason to reiterate them here. As illustrated by this case, deferral has no meaningful purpose if it requires, rather than precludes, relitigation of allegations which were considered by the Arbitrator, including but not limited to allegations of unlawful animus. Accordingly, should the Board conclude that *Babcock* not permit deferral in this case, MGM requests that the Board reconsider that decision and return to the traditional standards set forth in *Speilberg/Olin*.

MGM recognizes that altering the standard set forth in *Babcock* is not undertaken lightly by the Board, and, should deferral be denied, requests leave to submit a separate briefing on the issue, and to allow (as the Board did prior to *Babcock*) interested parties to submit amicus briefs regarding this issue.

V. CONCLUSION

For the foregoing reasons, MGM respectfully requests that the Complaint be dismissed in its entirety.

Dated this 12th day of April, 2019.

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s/ Paul T. Trimmer

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CYNTHIA THOMAS **Case No. 28-CA-186022**

and

MGM GRAND HOTEL, LLC D/B/A
MGM GRAND HOTEL AND CASINO

CERTIFICATE OF SERVICE

In addition to filing this **Posthearing Brief** in the above captioned matter via the NLRB's electronic filing system, copies have been served electronically on:

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